Supreme Court, U.S.
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No. 97-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

FRANCIS E. DADDARIO,

Petitioner,

v.

CAPE COD COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

PETITION FOR WRIT OF CERTIORARI.

V. DOUGLAS ERRICO*
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54 pp

QUESTIONS PRESENTED.

1. Whether an estate in land which is separately recognized and protected by state property law should be used as the denominator against which loss of value is to be measured in applying the "deprivation of all economically feasible use" rule for categorical regulatory takings analysis under the Fifth Amendment.

2. Whether a partial regulatory taking in violation of the Fifth Amendment can be established where a regulation defeats a property owner's investment-backed expectations and causes a loss of a substantial part, but not essentially all, of the economic use of a property.

3. The trial court found that the Respondent's permit denial was a regulatory taking in violation of the Fifth Amendment. The Supreme Judicial Court of Massachusetts vacated the trial court judgment, ruling that no taking had occurred. The Massachusetts Supreme Judicial Court went onto hold, *sua sponte*, that Petitioner's constitutional takings claim was not ripe for judicial review. The questions presented are:

a. Whether the denial of one complete land use permit application, which otherwise complied with applicable local bylaws, is sufficient to render the Petitioner's regulatory takings claim ripe for judicial review.

b. Whether the futility exception to the prudential ripeness requirement rendered Petitioner's regulatory takings claim appropriate for judicial review.

c. Whether prudential ripeness is jurisdictional in nature, such that a state appellate court may consider the issue despite the Respondent regulatory agency's failure to raise the issue either at trial or on appeal.

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No. 97-

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

PETITION FOR WRIT OF CERTIORARI.

INTRODUCTION.

Francis E. Daddario ("Petitioner") hereby Petitions this Court for a Writ of Certiorari to review the decision of the Supreme Judicial Court of the Commonwealth of Massachusetts entered on July 11, 1997. This decision on the merits declared the Petitioner had not established either a categorical or a partial regulatory taking of any interest in his real property and that Petitioner's regulatory takings claim under the Fifth Amendment to the United States Constitution was not ripe for judicial review.

OPINIONS BELOW.

The opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts, dated July 11, 1997 is reported at 425 Mass. 411 (1997). This decision (the "Decision") is reproduced in the appendix. (See Appendix 1a, hereinafter "(A. a)"). The case was decided in the Land Court Department of the Trial Court of the Commonwealth of Massachusetts (the "trial court") with written opinion. The opinion of the Land Court is also reproduced in the appendix (A. 11a).

JURISDICTION.

The Supreme Judicial Court entered its Order on July 11, 1997. Petitioner Daddario timely filed a petition for rehearing with the Supreme Judicial Court. The Supreme Judicial Court denied Daddario's petition for rehearing by notice dated August 5, 1997 (A. 30a). This Petition is being filed within ninety (90) days of the date of the Supreme Judicial Court's denial of said petition for rehearing. Jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED.

The Fifth Amendment to the United States Constitution provides, in pertinent part, as follows: "nor shall private property be taken for public use, without just compensation." The Fourteenth Amendment to the United States Constitution provides, in relevant part, as follows: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law."

STATEMENT OF THE CASE.

Petitioner Daddario seeks review of the Decision of the Supreme Judicial Court of the Commonwealth of Massachusetts which held that the denial by the Cape Cod Commission (the "Respondent") of a Development of Regional Impact ("DRI") permit to extract loam, sand and gravel from his property was not a taking without just compensation in violation of the Fifth Amendment to the United States Constitution. Petitioner Daddario further seeks review of the Decision of the Supreme Judicial Court that his regulatory takings claim was not ripe for judicial review.

A. *How the Federal Question Was Presented.*

The Petitioner raised his regulatory takings claim under the Fifth and Fourteenth Amendments to the United States Constitution in his original complaint filed with the trial court on March 1, 1995. The trial court, in its opinion dated June 14, 1996, specifically found:

> In consideration of the foregoing I find that the action of the Commission in disapproving the proposed DRI constitutes a taking of property in violation of the Massachusetts and United States Constitutions. . . .

(A. 27a.) In vacating the trial court's judgment, the Supreme Judicial Court provided, in relevant part, as follows:

> In deciding this case we consider both the Federal ripeness doctrine and regulatory taking principles and determine that both lead to the

conclusion that the result below cannot be affirmed.

(A. 5a.) The issues presented by the Petitioner herein, therefore, were clearly considered by the Massachusetts Supreme Judicial Court and form the basis of that state court decision.

B. *Material Facts.*

Petitioner acquired title to the subject premises, consisting of approximately seventy acres of land in Falmouth, Massachusetts (the "Locus"), by deeds recorded in 1964, for the primary purpose of mining the surface and subsurface borrow material therefrom. Petitioner has been the sole owner of the Locus since acquisition.

On or about February 25, 1994, Petitioner filed an application with the Town of Falmouth for approval of a required special permit to extract loam, sand and gravel from the Locus. Petitioner's proposal called for the phased excavation of sand and gravel from approximately thirty-one acres of his approximately seventy-acre parcel. The proposal provided for reclamation, including grading, loaming and seeding of each of seven phases and a 200-foot buffer with all abutters as required by the Falmouth Zoning By-Law. The Falmouth Zoning Board of Appeals determined that the proposed project constituted a development of regional impact under the Cape Cod Commission Act (the "Act") and immediately referred the application to the Respondent Commission on March 11, 1994.

The Respondent is a regional planning agency created by the state Legislature in 1989. The Respondent has permit authority relating to, among other things, commercial developments of regional impact, as Petitioner's proposal was clas-

sified. The Respondent has promulgated regulations with which proposals for DRI permits must comply. Jurisdiction is concurrent with the Town, and after DRI review, proposals must also be permitted by the local regulatory agency.

After conducting several hearings, the Respondent denied the Petitioner's application on February 2, 1995. Prior to the denial and during the review process, Respondent's staff suggested two facially infeasible "alternative" plans of excavation to Mr. Daddario. The first proposal, dated May 24, 1994, called for the complete excavation of the 200-foot buffer to the east of the Locus, in contravention of the Town of Falmouth By-Law. The second proposal, dated September 20, 1994, authorized significantly less excavation than the first "alternative," and also would have involved complete excavation of the 200-foot buffer to the east of the Locus. After the denial, the Petitioner filed an action in the Land Court claiming, *inter alia*, that the Respondent's denial constituted a regulatory taking under the State and Federal Constitutions.

Subsequent to the trial of this action in the Land Court, Mr. Daddario was granted a hearing before the Board of Appeals of the Town of Falmouth, and the project as proposed was granted a special permit by the Town on October 13, 1996.

The trial court, in a decision dated June 14, 1996, held that the denial of the DRI Permit constituted a taking under the Massachusetts and the United States Constitutions. The trial court applied an *ad hoc* test in analyzing the takings issue, including three main factors: economic impact, interference with investment-backed expectations, and the character of the government action. On the question of economic impact, the trial court held that there had been "a denial of economically viable use of the property as a result of the regulatory imposition," finding "that prior to the [Respondent's] actions herein, Locus had substantial value as a sand and gravel operation and that thereafter it had little or none." (A. 24a.) The trial court went

on to find that while "Locus may still have substantial value for other development," the evidence, which included the magnitude of the financial loss, demonstrated that "the action of the [Respondent] has crossed the line from a noncompensable 'mere diminution' to a compensable taking." (A. 24a.)

The trial court made no specific factual findings as to the value of the Locus as regulated. The Respondent's expert estimated the value of the property as regulated to be $550,000.00 to $600,000.00 for residential uses. The Petitioner's expert testified that the only feasible remaining use of Locus was as conservation land and ascribed a value of $465,000.00. The Petitioner's expert provided the only expert opinion as to the value of Locus as a sand and gravel mine. If this unchallenged estimate as to the value of the property as a sand and gravel mine is accepted, the residual value of the property for residential uses reflects a seventy-eight percent (78%) loss of value in Locus as regulated, while sale as conservation land will result in an eighty-two percent (82%) loss of value in the property as regulated.

The Respondent appealed the trial court's decision. The Supreme Judicial Court of Massachusetts granted Respondent's petition for direct appellate review. On appeal, the Supreme Judicial Court of the Commonwealth of Massachusetts vacated the judgment of the trial court, and found no taking. The Petitioner argued on appeal that the loss of his mining estate constituted a categorical taking of that property interest. The Supreme Judicial Court, citing *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470 (1987) and *Hodel* v. *Virginia Surface Mining and Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981), found that the restriction of a landowner's right to extract minerals from his property is not necessarily a regulatory taking, reasoning that the "property as a whole retains substantial value." The Supreme Judicial Court made no refer-

ence to Petitioner's claim that he owned a separate and distinct mining estate recognized for takings purposes by state law.

The Supreme Judicial Court, concluding that the regulatory action involved neither a physical invasion nor a complete deprivation of use, then articulated "several interrelated factors which are to be considered in determining whether a compensable taking has occurred" (A. 7a), including (1) the economic impact on the Petitioner; (2) interference with Petitioner's distinct investment-backed expectations; and (3) the character of the governmental action. The court concluded on the merits of Petitioner's takings claim that because "the property has substantial economic value for other uses" (A. 10a), there was no taking. The Supreme Judicial Court provided no discussion of the interrelated factors listed above.

The Supreme Judicial Court, despite ruling on the merits of Petitioner's takings claim, also found that the claim was not ripe, as no final determination had been reached by the Respondent. The Supreme Judicial Court reasoned that the denial of one application, submitted with "requisite materials" (A. 4a), did not result in a final determination. The Supreme Judicial Court also relied on the "alternative" plans for buffer excavation suggested by the Respondent's staff, which it found "would have permitted sand and gravel extraction on twenty-five acres" (A. 9a), despite acknowledging earlier in its Decision that the Town By-Law required the 200-foot buffer with abutting properties (A. 3a, n.1). The Supreme Judicial Court did not analyze the language of the Respondent's DRI permit denial itself in its discussion of ripeness, nor did it consider that the Respondent had conceded the ripeness issue both at trial and on appeal.

REASONS FOR GRANTING WRIT.

The Petitioner respectfully submits that certiorari should be granted because the case presents significant unsettled issues in the area of regulatory takings jurisprudence. The Petitioner's claim of a categorical taking of his mining estate raises a question specifically left unanswered by this Court in *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992), namely, whether the denominator against which loss is to be measured should be determined by assessing the degree to which a state has accorded legal recognition and protection to that property interest. The case also presents the Court with the opportunity to resolve the unsettled question of whether loss of a substantial part, but not essentially all, of the economic use of property can provide the basis for a partial takings claim under the *ad hoc* analysis articulated by the Court in *Penn Cent. Transp. Co.* v. *New York City*, 438 U.S. 104 (1978). The ripeness issues allow the Court to speak definitively as to: (1) whether the submission of one meaningful application for a land use permit which is unequivocally denied can provide the basis for a ripe takings claim; (2) the factors which should be considered in assessing prudential ripeness and the futility exception thereto; and (3) whether an appellate court can raise the ripeness issue *sua sponte*.

A. *The Categorical Taking and the Denominator Issue.*

By granting certiorari on the categorical takings claim presented by the Petitioner, the Court can establish a consistent rule concerning the determination of the denominator or "property interest" against which loss of value should be measured in categorical regulatory takings analysis. As this Court has observed, the rule regarding "deprivation of all eco-

nomically feasible use" lacks precision, due to the uncertainty associated with the determination of the appropriate denominator. *Lucas* v. *South Carolina Coastal Council*, 505 U.S. at 1016 n.7. The *Lucas* Court suggested, but did not decide, that the appropriate inquiry in establishing the denominator is a consideration of the legal recognition and protection afforded a particular property interest under state law. In this case, the Massachusetts Supreme Judicial Court improperly combined the Petitioner's mining estate and his residual interest in the surface estate in determining the denominator for its takings analysis under a "parcel as a whole" theory. Further direction from this Court on the issue is essential, given the conflicts in decision and principle which exist between and among the circuits and states. A grant of certiorari also allows the Court to resolve apparent inconsistencies in pronouncements by this Court over the years on the question presented.

The Supreme Judicial Court's application of the "parcel as a whole" theory to the Petitioner's separate and distinct mining estate appears to conflict directly with the decision of the Federal Circuit Court of Appeals in *Whitney Benefits, Inc.* v. U.S., 926 F.2d 1169 (Fed. Cir. 1991), *cert. denied*, 502 U.S. 952 (1991). Relying on the decisions of this Court in *Keystone* and *Hodel*, the Supreme Judicial Court concluded that the loss of mineral rights is not necessarily a taking when the "property as a whole" retains substantial value-interpreting "property as a whole" as both the Petitioner's mining estate and his separate interest in the surface estate. In *Whitney Benefits*, the holding of the Federal Circuit Court established that where state property law recognizes separate mineral and surface estates, and mineral rights are properly subject to the takings clause of the Fifth Amendment, the estate against which loss is to be measured for takings purposes is the mineral estate, and the inquiry does not implicate the uses, if any, of the remaining surface estate. 926 F.2d at 1174.

The Federal Circuit Court in *Florida Rock Indus.* v. *United States*, 18 F.3d 1560 (Fed. Cir. 1994); *cert. denied*, 115 S. Ct. 898 (1995) also considered a property owner's right to mine subsurface minerals as a separate "property interest," the destruction of which would constitute a compensable taking. 18 F.3d at 1572. The Tenth Circuit, however, in *Clajon Prod. Corp.* v. *Petera*, 70 F.3d 1566 (10th Cir. 1995), specifically rejected the *Florida Rock* approach, relying on *Penn Central* in concluding that the *Florida Rock* approach inappropriately divided a single parcel into discreet segments. The Supreme Court of Wisconsin, in *Zealy* v. *City of Waukesha*, 548 N.W.2d 528 (Wis. 1996), also rejected the *Florida Rock* approach relying on *Keystone*, finding it inappropriate to segment a contiguous property to determine the denominator for takings purposes. The Wisconsin Supreme Court, and the Massachusetts Supreme Judicial Court in this case, fail to recognize that the Court in *Keystone* analyzed the takings question only as to the property owner's remaining mining estate, dividing the property owner's estates exactly as Petitioner suggests is appropriate herein. The conflicts in decision and principle which exist on this issue can be resolved by this Court by granting the Petitioner's request for certiorari.

The importance of resolving this question is underscored by the fact that decisions of this Court in regulatory takings cases involving distinct estates in real property can, themselves, be viewed as inconsistent. In *Pennsylvania Coal* v. *Mahon*, 260 U.S. 393 (1922), a mining case, the Court first analyzed the separate real property estates recognized by the Commonwealth of Pennsylvania, concluding that support by the subjacent strata was a separate support estate entitled to recognition for takings purposes. The Court then held that a regulation which effectively denied all economic use of the support estate was a taking in violation of the Fifth Amendment. 260 U.S. at 414. In *Keystone*, a very similar mining rights case, the Court

again analyzed the separate and distinct estates recognized by the Commonwealth of Pennsylvania, but concluded that a similar regulation of the support estate was not a taking. While the Court came to different conclusions in each case, attributable simply to the Court's conclusion in *Keystone* that the support estate was not a separate estate under state property law, the Court clearly considered the mining estate as a distinct whole parcel for regulatory takings analysis.

In *Penn Central*, however, this Court rejected an argument advanced by the property owner based, at least in part, on its loss of the allegedly separate rights it possessed in the air space above an existing building. The *Penn Central* Court provided no discussion of the extent to which the property laws of the State of New York recognized a separate and distinct estate in air rights. Similarly, *in dicta* in *Hodel,* another pre-*Lucas* takings case involving the loss of mining rights under a Virginia statute, the Court opined that a property owner had not been deprived of economically viable use of his property where, *inter alia*, the act did not purport to regulate or proscribe non-mining uses of such land. Again, however, the Court did not engage in any analysis of the extent to which the Commonwealth of Virginia recognized a separate and distinct mining estate. The Petitioner, therefore, respectfully requests that this Court grant certiorari to resolve this longstanding and unsettled question and establish a rule that where state property law recognizes a separate estate in land and accords legal protection to such separate estate, the estate should be treated as a distinct whole parcel and used as the denominator for categorical takings analysis.

B. *The Partial Taking Issue.*

This case also gives the Court an opportunity to answer another significant question left open in *Lucas*: whether loss of a substantial part, but not essentially all, of the economic use of a property can result in a regulatory taking. 505 U.S. at 1017, n.8. The clarification of this issue will also resolve conflicts between and among the federal circuit courts and state courts on this question.

The decision of the Supreme Judicial Court, that substantial after-imposition economic value is an absolute bar to a partial takings claim, conflicts in principle with the Federal Circuit Court of Appeals decisions of *Yancey* v. *U.S.*, 915 F.2d 1534 (Fed. Cir. 1990) and *Florida Rock Indus.* v. *United States*, 18 F.3d 1560 (Fed. Cir. 1994), *cert. denied*, 115 S.Ct. 898 (1995). In *Yancey*, the Federal Circuit, in finding a taking where property value went from $91,616.00 to $20,887.00, held, without equivocation, that there exists no automatic numerical barrier preventing compensation in a partial takings case, but that the court must weigh all relevant considerations, including percentage diminution, in assessing the severity of the economic impact to a property owner. 915 F.2d at 1541. The Federal Circuit in *Florida Rock*, in considering whether a partial taking could be found where a regulation deprives an owner "of a substantial part but not essentially all of the economic use or value of the property," noted that "the Fifth Amendment prohibits the uncompensated taking of private property without reference to the owner's remaining property interests." 18 F.3d at 1568. The Ninth Circuit has also found a taking where a property retained significant value. *Del Monte Dunes at Monterey, Ltd.* v. *City of Monterey*, 95 F.3d 1422 (9th Cir. 1996) (sale of property to State of California for $800,000.00 more than the purchase price not dispositive on economic impact for takings purposes).

The bar imposed by the Supreme Judicial Court in this case, however, is not novel. Since this Court decided *Lucas*, the Supreme Court of the State of Wisconsin, in *Zealy* v. *City of Waukesha*, 548 N.W.2d 528 (Wis. 1996), relying in part on *Lucas*, found that where a parcel "retains substantial uses . . . we cannot conclude that the City's rezoning deprived [property owner] of all or substantially all the use of his land," concluding that without such loss "a taking cannot occur." 548 N.W. 2d at 534. Similarly, the Eleventh Circuit, in *Corn* v. *City of Lauderdale Lakes*, 95 F.3d 1066, 1072-74 (11th Cir. 1996) *cert. denied*, 114 S.Ct. 1400 (1996) appears flatly to reject any possibility of a regulatory taking where a property has remaining economic use, concluding that the standard for a taking is whether a regulation has denied all or substantially all economically viable use of land.

It is, therefore, vital that the Court resolve this conflict and determine whether remaining economic use is an absolute bar to a partial takings claim or whether, despite such remaining economic use, an unconstitutional taking may still be found applying the *ad hoc* factors analysis of *Penn Central*.

C. *The Ripeness Issues.*

The question of whether the submission of one meaningful and reasonable permit application renders a takings claim ripe for judicial review has not been settled by this Court. There presently exists no *per se* rule requiring multiple applications to establish ripeness, *see, eg., MacDonald, Sommer & Frates* v. *Yolo County*, 477 U.S. 340 (1986); *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172 (1985), nor is it clear that one meaningful application itself is sufficient to establish ripeness, *Suitum* v. *Tahoe Regional Planning Agency*, 117 S.Ct. 1659 (1997). It is also unclear

what, if any, other factors are appropriately considered in determining ripeness. *See MacDonald*, 477 U.S. at 359 (White, J., dissenting); *see also Herrington* v. *County of Sonoma*, 857 F.2d 567 (9th Cir. 1988), *cert. denied*, 489 U.S. 1090 (1989). The Court simply has not had occasion to rule definitively on the applicable standard. In fact, in *Suitum*, the Court's most recent decision on the prudential ripeness issue, this Court declined to adopt a rule that "one meaningful application" is sufficient to establish ripeness, concluding that the issue was not presented in that case. The issue is clearly presented here, where the Petitioner filed a permit application to mine less than half of his land which complied with the applicable Town By-laws and which application the Supreme Judicial Court found to be submitted with "the requisite materials." (A. 4a.) The Court should grant certiorari to settle the question of whether one meaningful application (and resort to variances, if available) renders a claim ripe for judicial review, and to provide guidance concerning those other factors which may be considered in connection with a determination of prudential ripeness.

In granting certiorari, the Court can also establish the scope of the futility exception to the prudential ripeness requirement. This Court did not have such an opportunity in *Suitum*, as the question presented did not involve a discretionary decision by the regulatory agency. Similarly, the decision by this Court in *Lucas*, concerning the futility of submitting a plan for development, was based on the non-discretionary nature of the regulation involved. At least two circuit courts have held that one meaningful application is a condition precedent to an application of the futility exception. *See Southern Pac. Transp. Co.* v. *City of Los Angeles*, 922 F.2d 498 (9th Cir. 1990), *cert. denied*, 502 U.S. 943 (1991); *Unity Ventures* v. *Lake County*, 841 F.2d 770 (7th Cir. 1988) *cert. denied*, 488 U.S. 891 (1988). However, the First Circuit, in *Gilbert* v. *City of Cam-*

bridge, 932 F.2d 51, 61-62 (1st Cir. 1991), *cert. denied,* 502 U.S. 866 (1991); *reh'g denied*, 502 U.S. 1051 (1992), characterized the one meaningful application standard as "ordinarily" a prerequisite to an application of the futility exception, referring to "other fact-dominated allegations" which could bring a claim within the futility exception. It is respectfully requested that this Court grant certiorari to declare whether one meaningful application is a condition precedent to an application of the futility exception, and to develop the law regarding those factors which a court should, or may, consider in applying the futility exception after such conditions precedent, as determined by the Court herein, have been satisfied.

The Supreme Judicial Court's treatment of prudential ripeness as a jurisdictional matter which cannot be waived or conceded by a regulatory agency fails to recognize the fact-intensive nature of the ripeness inquiry and should not stand. This is not an isolated concern, as the question was addressed by the Ninth Circuit in *Traweek* v. *City and County of San Francisco*, 920 F.2d 589 (9th Cir. 1990), which also found prudential ripeness to be jurisdictional. By granting certiorari, the Court can address this issue on unambiguous facts. The Petitioner contends that a regulatory agency's concession of prudential ripeness at trial must be binding, particularly where the Petitioner has necessarily acted to his detriment in reliance thereon in accepting the concession and omitting evidence relating thereto. This Court should, therefore, grant certiorari to establish that prudential ripeness considerations are not jurisdictional and may be conceded by the parties at the trial level.

CONCLUSION.

For all of the foregoing reasons, Petitioner Francis E. Daddario respectfully requests this Honorable Court to grant his

petition for certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts.

Respectfully submitted,

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APPENDIX A.

Daddario *v.* Cape Cod Commission.

FRANCIS E. DADDARIO *vs.* CAPE COD COMMISSION.

Suffolk. March 4, 1997. - July 11, 1997.

Present: WILKINS, C.J., ABRAMS, LYNCH, & FRIED, JJ

Cape Cod Commission. Regulatory Agency. Constitutional Law, Regulation, Taking of property.

This court concluded that property owners aggrieved by an action of the Cape Cod Commission disapproving a commercial project could not assert a taking claim under St. 1989, c. 716, § 17(*b*), absent a final determination by the commission on the nature and extent of development that the commission would permit. [414-415]

Discussion of the principles to be applied and factors to be considered in determining whether government conduct amounts to a regulatory taking. [415-417]

In the circumstances of the Cape Cod Commission's disapproval of the proposed extraction of sand and gravel from a certain parcel of land in an agricultural district, the record before a judge of the Land Court did not support his ruling that a regulatory taking had occurred, where the commission's decision did not preclude less extensive mining than proposed and where the property had substantial value for alternative uses. [417-418]

CIVIL ACTION commenced in the Land Court Department on March 1, 1995.

The case was heard by *Robert V. Cauchon, J.*

The Supreme Judicial Court granted an application for direct appellate review.

Eric W. Wodlinger (H. Hamilton Hackney III with him) for the defendant.

V. Douglas Errico (Thomas O. Moriarty with him) for the plaintiff.

The following submitted briefs for amici curiae:

Paul W. Edmondson, Elizabeth S. Merritt, & Laura Nelson, of the District of Columbia, *& Jerold S. Kayden,* for the National Trust for Historic Preservation in the United States.

Jeffrey M. Bernstein & Kenneth L. Kimmell for the Association for the Preservation of Cape Cod, Inc., & others.

[412] *Scott Harsbarger,* Attorney General, *& Madelyn Morris,* Assistant Attorney General, for the Commonwealth.

R. Jeffrey Lyman for the Massachusetts Audubon Society & another.

LYNCH, J. The plaintiff filed an action in the Land Court against the Cape Cod Commission (commission), pursuant to St. 1989, c. 716, An Act establishing the Cape Cod Commission (act), seeking judicial review and declaratory relief from the denial of a development permit. The judge ruled that the commission's decision constituted a taking under the State and Federal Constitutions, and pursuant to § 13 *(f)* of the act, ordered the commission to approve the plaintiff's development. We granted the commission's application for direct appellate review, and now vacate the decision of the Land Court.

The judge found the following facts. The commission was created to coordinate regional planning and land use development on Cape Cod. To accomplish this objective, the commission drafted a regional policy plan which seeks to balance economic development and natural resource conservation. Developments of regional impact, including any outdoor

commercial space greater than 40,000 square feet, are reviewed by the commission to determine whether they conform with the regional plan. § 12 *(c)* (6) of the act. The commission may approve, or approve with conditions, a proposed development if (1) the probable benefit from the project outweighs the probable detriment, (2) the project is consistent with the regional policy plan, and (3) the project is consistent with municipal development by-laws. § 13 *(d)* of the act. If the commission disapproves, the project may not go forward. However, any party aggrieved by the commission's decision may seek judicial review in the Superior Court or the Land Court. § 17 *(b)* of the act.

In 1964, the plaintiff purchased seventy acres of land (parcel) in Falmouth. The parcel is located in an AGA (agricultural) zoning district. Pursuant to art. XXIX of the Falmouth zoning by-laws (by-laws), earth removal is permitted in an AGA zoning district on the issuance of a special permit.[1]

[413] In February, 1994, the plaintiff applied to the zoning board of appeals of Falmouth (board) for a special permit. The proposed project called for the extraction of sand and gravel in seven phases, each approximately five acres. Each phase was to be reclaimed through grading, loaming, and seeding before work commenced on the next. The project qualified as a development of regional impact and the board referred it to the commission for review.[2]

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[1] The by-laws require that earth removal sites have a border buffer strip of at least one hundred feet from the side line of any road and two hundred feet from all abutting property lines, unless written consent of the abutting property owner has been received by the zoning board of appeals of Falmouth. The by-laws also require reclamation by grading, reloaming, and seeding.

[2] Once a municipal agency refers a proposed development to the commission or receives notice of the commission's intent to review a project, the municipal agency must suspend its review. § 12 *(h)* of the act.

In June, 1994, the plaintiff submitted an application with the requisite materials. After two public hearings, the commission denied the plaintiff's application because it did not meet the commission's standards for protection of natural resources, preservation of open space, and acceptable burdens on community infrastructure. The commission concluded that the proposed project "would not enhance or protect open space on the site in a way that respects the importance of sensitive natural resources of Cape Cod." The plaintiff appealed from the commission's decision to the Land Court.

The judge ruled that the commission's actions constituted a regulatory taking. He found that, prior to the commission's action, the parcel had "substantial value as a sand and gravel operation and that thereafter it had little or none." The judge indicated:

> "I do not find it necessary herein to determine precise before and after values, as the remedy provided for by the act is not money damages but, most likely in an effort to avoid such payments, grant of the requested relief. I do find that even though [the parcel] may still have substantial value for other development, the magnitude of the financial loss, as supported by the evidence, and the loss of an owner's right to use his property as he wishes, certainly demonstrate that the action of the [c]ommission has crossed the line from a non-compensable 'mere diminution' to a compensable taking."

The judge ordered the commission to approve the plaintiff's plan subject to certain conditions.

[414] The commission appealed arguing that the court erred in ruling that the commission's disapproval of the project constituted a regulatory taking. The commission further argued

that the decision entered in the Land Court was erroneous in that the judge: (a) ordered the commission to approve the project and established the only conditions to be attached to the approval; (b) failed to provide adequate findings of fact as required by Mass. R. Civ. P. 52 (a), as amended, 423 Mass. 1402 (1996); (c) applied the wrong standard of review to the commission's decision; and (d) failed to find that there was sufficient evidence at trial to demonstrate that the commission's decision was not arbitrary or capricious. Because we decide that the judge erroneously concluded that the commission's action constituted a taking, we need not reach these additional arguments.

Discussion. In deciding this case we consider both the Federal ripeness doctrine and regulatory taking principles and determine that both lead to the conclusion that the result below cannot be affirmed.

a. Ripeness doctrine. The Supreme Court has consistently declined to consider unripe takings claims. See *MacDonald, Sommer & Frates* v. *County of Yolo,* 477 U.S. 340, 351 (1986); *Williamson County Regional Planning Comm'n* v. *Hamilton Bank,* 473 U.S. 172, 186 (1985); *Agins* v. *Tiburon,* 447 U.S. 255, 260 (1980). See also *Wilson* v. *Commonwealth,* 413 Mass. 352, 356 (1992). The ripeness doctrine provides that "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson County Regional Planning Comm'n v. Hamilton Bank, supra* at 186.

The act's provisions for judicial review of the commission decisions may be in conflict with the ripeness doctrine as it applies to takings claims. Section 13 (*f*) of the act provides:

> "Notwithstanding the provisions of subsection (*d*) of section thirteen, the commission shall approve or approve with conditions a development of regional impact where an applicant demonstrates that to disapprove the development of regional impact would constitute a taking of property in violation of the Massachusetts and United States Constitu [415] tions; provided, however, that no reasonably foreseeable danger to the public health or safety will arise from such approval or approval with conditions."

Section 17 *(b)* of the act further provides: "Any party aggrieved by a commission decision on a development of regional impact may appeal the commission's decision to the Barnstable county superior court or the land court." There is no requirement that the applicant must submit alternative plans or demonstrate that a final determination has been reached on the nature and extent of the permitted development before appealing from a decision. Thus, the statute can be interpreted to provide for judicial review of individual decisions to determine whether the commission's disapproval constitutes a taking. See *Keenan, petitioner,* 310 Mass. 166, 179 (1941) (General Court has power to modify, enlarge, diminish, or transfer jurisdiction). See also Part II, c. 1, § 1, art. 3, of the Massachusetts Constitution.

However, "[i]t follows from the nature of a regulatory takings claim that an essential prerequisite to its assertion is a final and authoritative determination of the type and intensity of development legally permitted on the subject property. A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." *MacDonald, Sommer & Frates v. County of Yolo, supra* at 348. Thus, property owners cannot assert a taking claim under § 17 (*b*)

absent a final determination on the nature and extent of development that the commission will permit.

b. Regulatory taking principles. The judge found that, prior to the commission's action, the plaintiffs property had substantial value as a sand and gravel operation and thereafter it had none, although the property may still have substantial value for other development. The plaintiff argues that this was proper because his proposal was the only economically viable alternative for mining operations and thus the commission's denial of it was a taking.[3] We disagree. We conclude that the record does not support a finding that a taking has occurred.

"When a regulatory taking involves neither a physical invasion nor a complete deprivation of use, as in the case here, Federal law [416] has established several interrelated factors which are to be considered in determining whether a compensable taking has occurred: '(1) "the economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the Governmental action" ' " *Leonard* v. *Brimfield,* 423 Mass. 152, 154, cert. denied, 117 S. Ct. 582 (1996), quoting *Connolly* v. *Pension Benefit Guar. Corp.,* 475 U.S. 211, 225 (1986). See *Lucas* v. *Peabody,* 417 Mass. 299, 304 (1994). See also *Litcas* v. *South Carolina Coastal Council,* 505 U.S. 1003, 1015 (1992), and cases cited. "[T]here may . . . be a regulatory taking based, in part, on the regulation's economic impact on the property as a whole and the extent to which the regulation has interfered with a property owner's distinct investment-based expectations." *Steinbergh* v. *Cambridge,* 413 Mass. 736, 742 (1992), cert. denied,

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[3] The plaintiff's argument that art. 10 of the Massachusetts Declaration of Rights grants him greater rights than the United States Constitution does not rise to the level of appellate argument. See *Greater Media, Inc. v. Department Of Pub. Utils.,* 415 Mass. 409, 418 (1993) (four-sentence discussion which merely cites statue does not rise to level of proper appellate argument).

508 U.S. 909 (1993), citing *Penn Cent. Transp. Co.* v. *New York City,* 438 U.S. 104, 124-125, 130-131 (1978).

" ' Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." *Moskow v. Commissioner of Envtl. Mgt.,* 384 Mass. 530, 533 (1981), quoting, *Penn Cent. Transp. Co.* v. *New York City, supra* at 130-131. Rather, the proper focus is on the character of the action and the nature of the interference with the rights in the property as a whole. See *Steinbergh* v. *Cambridge, supra* at 742; *Moskow* v. *Commissioner of Envtl. Mgt., supra.* "When the claim is that government conduct, not amounting to a permanent physical occupation or confiscation of property, involves a regulatory taking, the analysis is peculiarly fact dependent, involving 'essentially ad hoc, factual inquiries.' " *Steinbergh v. Cambridge, supra* at 741, quoting *Penn Cent. Transp. Co. v. New York City, supra* at 124. Thus restrictions on a landowner's right to extract minerals from his property is not necessarily a regulatory taking when the property as a whole retains substantial value. See *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470, 496-497 (1987); *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.,* 452 U.S. 264, 296-297 (1981).

This court has repeatedly recognized that government regulations "may deprive an owner of a beneficial property use — even the most beneficial such use — without rendering the regulation [417] an unconstitutional taking." *Moskow* v. *Commissioner of Envtl. Mgt., supra,* quoting *Lovequist* v. *Conservation Comm'n of Dennis,* 379 Mass. 7, 19 (1979). See *Leonard v. Brimfield, supra* at 156. "Land use planning is not an all-or-nothing proposition. A government entity is not required to permit a landowner to develop property to [the] full extent he might desire or be charged with an unconstitutional taking of the property." *MacDonald, Sommer & Frates* v.

County of Yolo, 477 U.S. 340, 347 (1986). That an alternative, permissible use might be less profitable is not determinative. See *Penn Cent. Transp. Co.* v. *New York City*, *supra* at 124.

We conclude that the record before us does not support the ruling that a regulatory taking took place. The commission denied the plaintiff's proposal to mine thirty-two acres. This denial did not preclude less extensive sand and gravel operations. See *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, *supra* (no taking where regulation only restricted amount of coal which could be extracted). In fact, the commission's staff proposed a plan which would have permitted sand and gravel extraction on twenty-five acres, but the plaintiff declined to consider this alternative or modify his proposal. While not conclusive, the staff's plan demonstrated a willingness to permit less extensive mining proposals.[4] The denial of a particular plan cannot be equated with a refusal to permit any development. See *MacDonald, Sommer & Frates* v. *County of Yolo*, *supra* at 347.

Even if less extensive mining operations were not feasible, the record shows that the property has substantial value for alternative uses. The property is zoned in an agricultural district, which under the Falmouth zoning by-laws, allows for community [418] service, agricultural, and residential uses.[5]

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[4] It is possible that the plaintiff's proposal for sand and gravel operation is the only economically viable plan for the site, in which case its denial might constitute a regulatory taking. Because there has been no final determination regarding the nature and extent of the regulation in this case, "it is impossible to tell whether the land retain[s] any reasonable beneficial use or whether [existing] expectation interests [have] been destroyed." *MacDonald, Sommer & Frates* v. *County of Yolo*, 477 U.S. 340, 349 (1986), quoting *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 189-190 n.11 (1985). However, we need not speculate on this issue where there is clear evidence that the plaintiff owns more than a mineral estate and property has other valuable uses. See *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 296-297 (1981).

[5] There was ample evidence in the record to show that the property had substantial value even without a permit to remove sand and gravel.

There is no evidence in the record that the commission would oppose a residential development on the plaintiff's property. Indeed, the plaintiff contemplated residential use after removing the sand and gravel.

"Since loss of economic use and value is the issue in this regulatory taking case, it is not possible, absent a valid determination in the record of the 'after imposition' value, to know if a taking occurred . . . ." *Florida Rock Indus., Inc.* v. *United States,* 18 F.3d 1560, 1579 (Fed. Cir. 1994), cert. denied, 513 U.S. 1109 (1995). Because it is possible that less extensive sand and gravel operations may be approved and that the property has substantial economic value for other uses, we conclude that the findings of the judge do not support his conclusion that there was a taking.

The judgment is vacated and the matter is remanded to the Land Court for further proceedings consistent with this opinion.

APPENDIX B.

COMMONWEALTH MASSACHUSETTS

LAND COURT

DEPARTMENT OF THE TRIAL COURT

BARNSTABLE, SS.

MISCELLANEOUS
CASE NO. 215603

FRANCIS E. DADDARIO,
Plaintiff

vs.

THE CAPE COD COMMISSION,
Defendant

DECISION

Plaintiff Francis E. Daddario ("Plaintiff") filed a complaint for judicial review on March 1, 1995, pursuant to Chapter 716 of the Acts of 1989, as amended, An Act Establishing the Cape Cod Commission ("the Act"), and for declaratory relief pursuant to G. L. c. 185, § 1, and c. 231A, § 1 et. seq., and damages arising from the Cape Cod Commission's denial of a Development of Regional Impact permit involving certain property owned by Plaintiff in Falmouth. Plaintiff also alleges an unconstitutional regulatory taking of said property and requests that this court annul the decision of the Cape Cod Commission, approve Plaintiff's application and declare that the actions of the Cape Cod Commission are unlawful, unenforceable and a violation of Plaintiff's constitutional rights.

The trial commenced on January 29, 1996. It was held over six days and concluded on February 8, 1996. The proceedings were recorded and transcribed by a court-approved stenogra-

pher. Thirteen witnesses testified and sixty-one exhibits were introduced into evidence. All exhibits are incorporated herein by reference for the purpose of any appeal. A view of the subject property was taken by the court, in the presence of counsel, on April 1, 1996.

After reviewing the evidence and considering the pleadings filed by the parties, I make the following findings of fact.

1. Plaintiff is an individual residing at Plaza East, Apartment PHL, 4300 North Ocean Boulevard, Ft. Lauderdale, Florida.

2. Defendant Cape Cod Commission ("the Commission"), the planning and land use commission for Barnstable County, was established pursuant the Act, which became effective on or about January 16, 1990. The Commission has an address and principal place of business at 3225 Main Street, Barnstable.

3. By deed dated January 7, 1964, and recorded with the Barnstable Registry of Deed in Book 1245, Page 41, Plaintiff acquired title to three parcels of land containing approximately 52 acres in Falmouth. By separate deed dated April 24, 1964, and recorded in Book 1259, Page 436, Plaintiff acquired a fourth parcel, contiguous with one or more of the other three parcels, located on Thomas Landers Road in Falmouth. Plaintiff has been the sole owner of all four parcels since acquisition. The four parcels comprise the subject property ("Locus") in this action.

4. Locus consists of approximately 70 acres of vacant land in Falmouth. Locus is bordered to the north by Thomas Landers Road, a public way, and to the northwest by Shallow Pond. To the west, Locus is bordered by a sand and gravel mining operation and by land owned by the Town of Falmouth. To the south, Locus is bordered by a residential neighborhood of single family homes, and to the northeast Locus is bordered by another sand and gravel mining operation.

5. Under the Town of Falmouth Zoning By-Law ("the By-law") in effect presently and at the time of Plaintiff's petition, Locus is and was located in an AGA (agricultural) zoning district. Article XXIX of the Zoning By-law allows earth removal in an AGA zoning district upon the issuance of a special permit by the Town of Falmouth Board of Appeals.

6. On February 25, 1994, Plaintiff filed an application with the Town of Falmouth for the approval of a special permit for the Daddario Gravel Mining Operation ("the proposed project") to extract sand and gravel from Locus.

7. The proposed project calls for the extraction of sand and gravel in seven phases from areas referred to as "cells", each cell comprised of five acres or less. After extraction, each cell would be reclaimed through grading, loaming and seeding prior to commencement of work on the following phase, in accordance with the By-Law. The entire project is proposed with 200' buffer strips around the edges, as required by the By-Law.

8. The application for the proposed project was referred to the Commission by the Falmouth Zoning Board of Appeals on March 11, 1994, as a Development of Regional Impact ("DRI") of "outdoor commercial space greater than forty thousand square feet." Plaintiff submitted a DRI application form with requisite materials and application on June 28, 1994.

9. The 90-day period in which the Commission must conduct its public hearing was extended by agreement of the parties, and public hearings were held on August 2 and December 1, 1994.

10. After the public hearings, the Commission issued a decision dated February 2, 1995, denying Plaintiff's application for a DRI permit under sections 12 and 13 of the Act. The Commission concluded that the proposed project "would not enhance or protect open space on the site in a way that re-

spects the importance of sensitive natural resources of Cape Cod." Plaintiff appeals said denial in this case.

The Cape Cod Commission Act

11. The Commission was established because Cape Cod

> possesses unique natural, coastal, scientific, historical, cultural, architectural, archaeological, recreational, and other values; there is a regional, state and national interest in protecting, preserving and enhancing these values; and these values are being threatened and may be irreparably damaged by uncoordinated or inappropriate uses of the region's land and other resources.

St. 1989, c. 716, § 1 (a).

12. The Commission's purpose is to further

> the conservation and preservation of natural undeveloped areas, wildlife, flora and habitats for endangered species; the preservation of coastal resources including aquaculture; the protection of groundwater, surface water and ocean water quality as well as the other natural resources of Cape Cod; balanced economic growth; the provision of adequate capital facilities, including transportation, water supply, and solid, sanitary and hazardous waste disposal facilities; the coordination of the provision of adequate capital facilities with the achievement of other goals; the development of

> an adequate supply of fair affordable housing; and the preservation of historic, cultural, archaeological, architectural, and recreational values.

Id. § 1 (c).

13. The Commission is charged with preparing a Regional Policy Plan ("RRP"), the goal of which is to "present a coherent set of regional planning policies and objectives to guide development throughout said Barnstable County and to protect the region's resources, and which shall reflect and reinforce the goals and purposes set out in section one." Id. § 7 (a) .

14. The Commission is further charged with reviewing and regulating Developments of Regional Impact ("DRI"), pursuant to §1 (b) of the Act. A DRI is defined as a

> development which because of its magnitude or the magnitude of its impact on the natural or built environment, is likely to present development issues significant to or affecting more than one municipality, and which conforms to the criteria established in the applicable standards and criteria for developments of regional impact pursuant to Section 12.

Id. § 2 (h).

15. The Act further provides that any proposed industrial development comprised of outdoor commercial space greater than 40,000 Square feet is presumed to be a DRI. Id. § 12 (c) (6).

16. If a proposed development meets the standards and criteria for a DRI the Commission will review the proposed

development either by referral from a municipal agency or upon its own determination. once a municipal agency refers the proposed development to the Commission or receives notice of the Commission's intent to review, the municipal agency shall suspend its review of the application. Id. § 12(h).

17. The suspension of municipal agency review has the effect of extending "all constructive grant periods for municipal agencies for a period equal to the duration of commission review, such periods to resume running after a final commission decision is rendered." Id.

18. Upon the receipt of a proposed DRI, the commission is charged with reviewing the proposal for its consistency with the Act, the RPP and the local comprehensive plan. The Commission may approve the proposal if it finds that (1) the probable benefits from the project outweigh the probable detriments and (2) the project is consistent with the RPP, and the local comprehensive plan, and (3) the proposed development is consistent with the municipal development by-law. Id. § 13(d).

19. The Commission may approve, approve with conditions or disapprove a proposed DRI. If the commission disapproves a DRI, no further work may be done on the development. Id. § 13(e).

20. Section 13(f) of the act provides that

> Notwithstanding the provisions of subsection (d) of section thirteen, the commission shall approve or approve with conditions a development or regional impact where an applicant demonstrates that to disapprove the development of regional impact would constitute a taking of property in violation of the Massachusetts and United States Constitutions; provided, however, that no reasonably foreseeable danger to the

> public health or safety will arise from such approval or approval with conditions.

21. Any party aggrieved by a decision of the Commission regarding a DRI may appeal the Commission's decision to the Barnstable Superior Court or the Land Court. Id. § 17(b).

22. Pursuant to section 17(d) of the Act, this court is directed to

> hear all evidence pertinent to the authority of the commission and determine the facts, and, upon the facts as so determined, annul such decision if found to exceed the authority of said commission or make such other decree as justice and equity may require.

This standard is identical to that found in G. L. c. 40A, § 17 for judicial review of decisions of a board of appeals or special permit granting authority. In such instances "no special weight attaches to either the conclusions of law or findings of fact of a board of appeals on judicial review. . . . The trial judge hears the matter de novo and 'determines the legal validity of the decision of the board upon the facts' which the judge finds." Needham Pastoral Counseling Center Inc. v. Board of Appeals of Needham, 29 Mass. App. Ct. 31, 32 (1990), (citing Josephs v. Board of Appeals of Brookline, 362 Mass. 290, 295 (1972)).

The Regional Policy Plan

23. Pursuant to the Act, the RPP was duly approved by the Barnstable County Assembly of Delegates and became effective September 6, 1991.

24. The RPP, a planning and regulatory document, establishes review and regulatory policies applicable to DRIs. The

RPP provides Minimum Performance Standards ("Standards") which set forth mandatory minimum standards for future development.

25. The RPP explains that if an applicant demonstrates that the interests protected by a given Standard are better served by an alternative approach, the Commission may modify the application of said Standard. Regional Policy Plan, p. 9. In this instance, the Commission made no such modifications.

26. The parties have stipulated that the language of the Commission's decision (Exhibit 1) notwithstanding, the proposed development is consistent with all applicable Standards except the following: 2.1.1.2 A.2; 2.1.1.3; 2.4.1.1 B.1; 4.1.1.1; 4.1.1.2; 4.1.1.3; 4.1.2.1; 4.2.2.3; 4.3.1.1; 6.1.1; 6.1.4; and 6.1.5.

27. Standards 2.1.1.2 A.2, 2.1.1.3 and 2.4.1.1 B.1 all deal with the protection of natural resources, specifically water resources, wildlife and plant habitat, as follows:

> a. Commercial and industrial development and redevelopment that involves the use, treatment, generation, storage or disposal of hazardous wastes or hazardous materials, with the exception of retail sales and household quantities, shall not be permitted. RPP
>
> Standard 2.1.1.2 A.2
>
> b. Development and redevelopment shall identify proposed wells and existing private wells on abutting properties within 400 feet and assess the impact of the development on the water quality of these wells. Septic systems shall be sited so as to avoid contamination of existing or proposed wells. RPP Standard 2.1.1.3.

c. Applications for Developments of Regional impact that propose to alter such areas shall contain a wildlife and plant habitat assessment. Such assessments shall identify the presence and location of wildlife and plant habitat, including vernal pools, and be a guide for the layout of the development. Developments shall be planned to minimize impacts to vegetation and wildlife. RPP Standard 2.4.1.1 B.1.

28. Standards 4.1.1.1, 4.1.1.2, 4.1.1.3, 4.1.2.1, 4.2.2.3, and 4.3.1.1 relate to community facilities and services including transportation, solid and hazardous waste management and capital facilities and infrastructure, as follows:

a. Development and redevelopment shall not degrade the existing levels of service (LOS) of surrounding roads and intersections . . . . Where existing levels of service are below these specified levels, development and redevelopment shall maintain or improve performance indicators . . . . RPP Standard 4.1.1.1.

b. Developments of Regional Impact shall mitigate any traffic impacts that are created by such developments. The mitigation strategies shall include both structural and nonstructural improvements, with special emphasis on alternatives to private automobile transportation. Necessary improvements shall occur concurrently with any development, or a contribution of funds toward the necessary improvements shall be provided . . . . RPP Standard 4.1.1.2.

c. Development and redevelopment shall comply with permissible forms of mitigation . . . [which] take into account not only road function and classification

but the presence of environmentally sensitive areas, regional economic impacts and scenic and historic values .... RPP Standard 4.1.1.3.

d. Developments of Regional Impact shall make provisions for alternate transportation modes to offset at least 20% of their projected traffic volumes. . . . In lieu of providing these services in-kind, the developer may make a contribution to the Cape Cod Regional Transit Authority or a private transit company approved by the Commission in order to provide public transportation. RPP Standard 4.1.2.1.

e. Commercial and industrial development and redevelopment that involves the use, treatment, generation, storage or disposal of hazardous wastes or hazardous materials, with the exception of retail sales and household quantities, shall not be permitted within Wellhead Protection Districts. RPP Standard 4.2.2.3.

f. Approval of development and redevelopment which increases the intensity of use shall be based on existing infrastructure capability or on a development's ability to provide for or contribute the infrastructure and services necessary to support it. RPP Standard 4.3.1.1.

29. Standards 6.1.1, 6.1.4, and 6.1.5 relate to the preservation and availability of open space:

a. Development or redevelopment within the Capewide Open Space/Greenbelt network . . . shall maintain its integrity by clustering away from sensitive resources and maintaining a continuous corridor to

preserve both edge and interior wildlife habitat. RPP Standard 6.1.1.

b. Commercial development which qualifies as a Development of Regional Impact shall provide 40% of the lot area excluding wetlands, as permanent open space including landscaped areas designed to screen and buffer the development . . . . Where appropriate, open space may be provided off site within the same town, or a contribution of funds may be made to the town for open space acquisition. . . . RPP Standard 6.1.4.

c. In the design of developments, significant natural and fragile areas including critical wildlife and plant, water resources . . . and significant land forms shall be protected. RPP Standard 6.1.5.

The Falmouth Zoning By-Law

30. Article XXIX of the By-Law, Earthmoving Regulations, requires a special permit for such operations. Falmouth Zoning By-Law, § 240-150. Said special permit applications are subject to the procedures outlined in Article XXXXII of the By-Law, the Special Permit Procedures.

31. Earthmoving regulations require that a border bufferstrip of at least 100 from the side line of any road and 200 from all abutting property lines be provided, unless written consent of the abutting property owner has been received by the Board. Id. § 240-154B. Said regulations also require reclamation by grading, reloaming and seeding. Id. § 240-154 0(l)-(4). In addition, security in the form of a cash deposit or

surety bond must be posted with the Town Treasurer to secure compliance with the reclamation requirements. Id. § 240-155.

32. Article XX of the By-Law, Wildlife Corridor, applies to any project requiring a special permit, and serves to "establish and protect permanent and contiguous corridors and special areas for feeding, breeding and normal home range movement of wildlife through the defined habitat. Id. § 240-91.

33. The Wildlife Corridor By-Law requires that the applicant establish contiguous corridors with a minimum width of 300' across the subject site and to adjacent parcels and corridors. It also requires that natural, indigenous vegetation be encouraged or enhanced by the project and requires that disturbed areas be revegetated. Finally, it discourages "dramatic" changes in topography. Id. §§ 240-94 A(2), A(5) and A(6).

As stated above, § 13(f) of the Act states in substance that where the applicant demonstrates that disapproval of the DRI would constitute a taking of property in violation of the Massachusetts and United States Constitutions, the Commission shall approve or approve with conditions the DRI, "provided no reasonably foreseeable danger to the public health or safety will arise from such approval . . . ."

I find no competent evidence of any reasonably foreseeable danger to the public health or safety arising from the approval of the DRI or of its approval with conditions. Having so found I next consider whether or not the disapproval constitutes a taking in violation of the Massachusetts and/or United States Constitution.

The pertinent language of the Massachusetts Declaration of Rights, Article X, is as follows "but no part of the property of any individual can, with justice be taken from him, or applied to public uses without his consent . . . and whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable

compensation therefore. . . ." The United States Constitution states somewhat more simply in Amendment V "nor shall private property be taken for public use, without just compensation."

Clearly the objectives of the commission and their actions in denying the DRI were and are a sincere effort to protect the public interest.

> There can be no doubt today that every effort must be made . . . to protect our natural heritage and to pass it to future generations unspoiled. The destruction of ancient civilizations by human misuse of the environment, . . . teaches the need for public policies that work with the natural environment rather than attempt radically to alter it. The question at issue here, is when the Government fulfills its obligations to preserve and protect the public interest, may the cost of obtaining that public benefit fall solely upon the affected property owner or is it to be shared by the community at large.

Loveladies Harbour, Inc. v. U.S., 28 F.3d 1171, 1175 (Fed. Cir. 1994). Clearly under the law today the costs of such preservation and protection must be shared by all property owners not just the relatively few whom the policy happened to adversely impact. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992) ; Agins v. Tiburen, 447 U.S. 255, 260 (1992) ; Loveladies, 28 F.3d at 1175; Florida Rock Industries, Inc. v. U.S., 18 F.3d 1560 (Fed. Cir. 1994).

Nor is a taking 1imited to situations where all economic benefit or viability is lost, because a partial loss, as opposed to a "mere diminution", can also be a taking. Florida Rock Industries, Inc., 18 F.3d at 1590. Loveladies sets forth certain

criteria which, if met, will establish a regulatory taking. Such criteria as here applicable are as follows.

First, there has been a denial of economically viable use of the property as a result of the regulatory imposition. Here Plaintiff seeks to operate a sand and gravel operation in seven phases with each phase involving approximately five acres, or a total of about thirty-five acres, on Locus which contains seventy acres. Each phase is to be reclaimed in compliance with the zoning by-law before work is begun in the next. The denial of the DRI has precluded such use.

I find that prior to the Commission's actions herein, Locus had substantial value as a sand and gravel operation and that thereafter it had little or none. I base this finding on the testimony of Plaintiff and his expert, Dr. Cochrane. Plaintiff is not only the owner of Locus, he is also a successful businessman well versed in the construction and sand and gravel business. I do not find it necessary herein to determine precise before and after values, as the remedy provided for by the act is not money damages but, most likely in an effort to avoid such payments, grant of the requested relief. I do find that even though Locus may still have substantial value for other development, the magnitude of the financial loss, as supported by the evidence, and the loss of an owner's right to use his property as he wishes, certainly demonstrate that the action of the Commission has crossed the line from a noncompensable "mere Diminution" to a compensable taking.[1]

It must also be determined that the loss of rights and value is directly attributable to the actions of the Commission and not other legal or regulatory impediments, that the land is otherwise usable. Lopes v. Peabody, 417 Mass. 299, 306 (1994). The only such impediment herein involved is the Zoning By-

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[1] I note the Act does not differentiate between taking and compensable taking, a difference that is herein moot for reasons stated.

Law of the Town of Falmouth under which the original petition was filed. It would appear from § 12(h) of the Act, above quoted, that after a DRI permit is finally acted upon the matter is returned to the local municipal agency which proceeds with the processing of the application. It further appears that failure of the local agency to so act may well result in a constructive grant.[2] The filing of the denial was a final action; however, in this instance and acting on advice of the Commission, the Board has refused to act despite the request of Plaintiff. Interestingly the Commission advised the Board that it could act to deny the application, but could not approve it, as such action would be "working on the project" a somewhat strained interpretation of the above section.

Inasmuch as the failure of the Board to act is directly attributable to the Commission, I find and rule that the Commission may not raise the lack or necessity of action by the Board as defense to the taking claim.[3] Moreover, after a review of the proposal and the By-law, there appears to be a reasonable likelihood that the special permit will issue.

The second test is that the property owners had a distinct investment-backed expectation. It is uncontroverted that when Mr. Daddario purchased locus over thirty years ago he did so as a future investment. Considering the testimony and the fact that he and his father before him were successful contractors, the location of Locus, and use made thereof, I find that such acquisition was done with an investment-backed expectation.

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[2] It appears in this matter that a constructive grant by the Board of appeals may have resulted from its non-action. For some reason not appearing herein, there is no record of Plaintiff attempting to perfect such remedy under c. 40A, § 9, perhaps because the remedy therein in the case of "no action" as opposed to no action after hearing, is somewhat unclear, to say the least.

[3] The language of § 13(f) "notwithstanding the provisions of subsection (d)" may obviate the consideration of the Zoning By-Law.

Lastly, the interest vested in the owner must be a matter of state property law and not within the power of the state to regulate under common law nuisance doctrine. Although a sand and gravel pit is probably a less than desirable activity to residential neighbors, the fact is that Locus is abutted by two sand and gravel operations and a concrete batching plant. Moreover, there are or have been other such operations in the general vicinity. Sand and gravel are valuable commodities much in demand for projects, both public and private, including capital facilities and affordable housing, throughout the Commonwealth, a fact recognized by the Town in establishing its Earth Removal By-law with which Plaintiff must still comply. Accordingly, I find that Plaintiff's rights in Locus vest as a matter of property law, and not within the power of the state to regulate under common law nuisance doctrine.

In consideration of the foregoing I find that the action of the Commission in disapproving the proposed DRI constitutes a taking of property in violation of the Massachusetts and United States Constitutions and accordingly order the Commission to approve the DRI with conditions. Such conditions are limited to those standards stipulated to herein. Such conditions as may constitute a "taking" or contribute thereto are of course excluded.

Upon a reading and analysis of all the evidence pertinent to the authority of the Commission, as set forth in detail below, I find that some of the disputed Standards set forth in the parties, stipulation do not apply to the proposed project and shall not be included as conditions of the approval. Other standards are satisfied and conditions may be imposed to insure their compliance. It further appears doubtful that some of the remaining standards satisfy the "rough proportionality" standard established by the Supreme Court in Dolan v. Tigard, 114 S. Ct. 2309, 2319-20 (1994), which requires that the regulatory agency "make some sort of individualized determination

that the required dedication is related both in nature and extent to the impact of proposed development."

I find that Plaintiff's proposed project complies with Standards 2.1.1.2 A.2 and 4.2.2.3 dealing with the storage of hazardous materials on the site, inasmuch as Plaintiff will use a service to fuel their vehicles on site as necessary, alleviating any need for storage. The approval may be conditioned on continued compliance with these Standards.

Plaintiff is not Proposing to install septic systems or put materials into the ground. In light of this and Plaintiff's commitment not to store petroleum or hazardous products on site, I find that there is no foreseeable circumstance in which the proposal will adversely impact water quality, and, accordingly, Standard 2.1.1.3 is not applicable.

I further find that Standard 2.4.1.1 B.1, which calls for the completion of a wildlife and plant habitat assessment, has been satisfied by the proposal, as Plaintiff has supplied the required assessment to the Commission.

This standard also sets forth the additional requirement that the development be planned to minimize impacts to wildlife and plant habitat. In this regard, the Commission rejected Plaintiff's plan and proposed an alternative configuration which would allow plaintiff to extract sand and gravel from 25 acres of the 70 acre locus (35% of his property). I find that such requirement as applied to this case would appear to constitute a taking and may not be a condition. The foregoing notwithstanding, I further find that Plaintiff's proposal which includes phasing, restoration, and the creation of buffer zones around wetlands resources and along the perimeter of the site, balances the need to minimize detrimental impacts to habitat while allowing Plaintiff to effectively mine his property in the appropriate locations and complies with this Standard.

Similarly, Standard 6.1.1 requires developments in the Capewide Open Space/Greenbelt network to cluster develop-

ment away from sensitive resources and maintain a continuous wildlife corridor. I find this standard incongruous with the proposed project, especially in light of the fact that the Commission proposed that the Plaintiff "cluster" his mining activity in areas that may not be productive. While such requirement is an obvious incursion on Plaintiff's property rights, I find that by phasing the proposal and establishing buffer zones, a significant portion of Plaintiff's property will remain as undisturbed open space throughout the duration of the mining activity and more than meets any legal obligation of Plaintiff.

Standard 6.1.5 requires developments to protect significant natural and fragile areas and land forms. I find that the proposed buffer zones around these wetland resources is sufficient to protect against adverse impacts. Regarding the protection of significant land forms, I again find this requirement irreconcilable with the use Plaintiff has proposed for his property, and must be excluded.

Regarding the aforementioned Standards designed to protect habitat and wildlife, I find that the Commission's approval may be conditioned on regular inspections of the buffer zones to insure compliance.

I find that while such requirement certainly falls into the taking category, Plaintiff has met Standard 6.1.4, requiring the dedication of 40% of the lot area excluding wetlands as permanent open space. Plaintiff proposes to mine approximately 50% of locus, and naturally, he proposes to mine the 50% which he believes will be the most productive sources of sand and gravel. I find the Commission is unreasonable in dictating which areas Plaintiff must leave as open space, without offering compensation for said areas. Furthermore, I find no Legislative authority giving the Commission jurisdiction to determine which 40% a DRI applicant must set aside. I also note that this Standard applies to "commercial" developments and

suggest that sand and gravel mining is not such a development.

Finally, I find that the Standards falling under Section 4 of the RPP regarding transportation and capital facilities are not applicable to the proposed project for the following reason.

Standard 4.1.1.1 requires that proposed developments shall not degrade existing levels of service of surrounding roads. Conflicting testimony was presented regarding the potential of such impacts, but in the worst case scenario which I do not accept, the proposal would have a marginal effect on only one intersection. I find that credible evidence was presented to show that the worst case scenario would not or most likely not be realized, and thus I find that the proposed development satisfies said Standard. As a result of this finding, the approval may not be conditioned on the Commission's earlier requirement pursuant to Standards 4.1.1.2, 4.1.1.3, 4.1.2.1 and 4.3.1.1 that Plaintiff donate a $40,000 "fair share contribution" for traffic impact mitigation and $12,400 to fund alternative transportation to offset traffic volumes.

Approval of the DRI may be conditioned on compliance with Sections 2.1.1.2 A.2 and 4.2.2.3, and periodic inspections of the required buffer zones. No further conditions may be added to such approval.

Judgement Accordingly.

/s/

Robert V. Cauchon
Chief Justice

Dated: June 14, 1996

APPENDIX C.

Supreme Judicial Court for the Commonwealth of Massachusetts
1412 Courthouse, Boston, Massachusetts 02108
(617) 557-1020

V. Douglas Errico, Esquire
Marcus, Goodman, Emmer & Brooks, P.C.
45 Braintree Hill Off. Park #107
Braintree, MA 02184

RE: No. SJC-07329
FRANCIS E. DADDARIO
vs.
THE CAPE COD COMMISSION

NOTICE OF DENIAL OF PETITION FOR REHEARING

The Petition for Rehearing filed in the above captioned case has been considered by the court and is denied.

Very truly yours,

Jean M. Kennett, Clerk

Dated: August 5, 1997

To: V. Douglas Errico, Esquire
Eric W. Wodlinger, Esquire
Jerold S. Kayden, Esquire
Jeffrey M. Bernstein, Esquire
Madeline Morris, A.A.G.
R. Jeffrey Lyman, Esquire
Atty. Paul W. Edmondson
Land Court